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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SPENCER CRANNEY, MITCHELL AMOS, CATHERINE SAMUELSON, DOUGLAS BROWN, and RICHARD MONIGHETTI et al., on behalf of themselves and all other employees similarly situated,

Plaintiffs,

vs.

CARRIAGE SERVICES, INC., CARRIAGE FUNERAL HOLDINGS, INC., CFS FUNERAL SERVICES, INC., CARRIAGE HOLDING COMPANY, INC., CARRIAGE MANAGEMENT, L.P., CARRIAGE INVESTMENTS, INC., MELVIN C. PAYNE and LORIE PARAMETER,

Defendants.

Case No. 2:07-CV-01587 RLH-PAL

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR COLLECTIVE ACTION NOTIFICATION

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MISCELLANEOUS

I. INTRODUCTION

Plaintiffs' Motion for Collective Action Notification is, on its face, the antithesis of what Congress intended when it amended the Fair Labor Standards Act ("FLSA") to allow a court to issue notice to "similarly situated" employees and to certify a collective action. 29 U.S.C. § 216(b). The significance of the notice and certification procedures cannot be overstated. Congress specifically provided these procedural checks as a way to prevent "financial ruin of many employers" and the burdening of the courts "with excessive and needless litigation." Portal-to-Portal Act of 1947 § 1(a)(1), (7), codified at 29 U.S.C. §§ 251(a)(1), (7). It is the "opt-in" requirement and the requisite "similarly situated" analysis that assure both the Court and the defendant that the group-wide litigation being brought is, in fact, being brought on behalf of employees who have a real interest in, stake in, and knowledge of the issues being raised in the lawsuit. See, e.g., Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1248 (11th Cir. 2003); see also 93 Cong. Rec. 2182 (1947) (Senator Donnell, Chairman of the Senate Judiciary Committee, speaking of the necessity of the opt-in device: "It is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit.").

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Plaintiffs – one current and four former disgruntled Funeral Directors, all paid on a salary basis[1] – allege that they were not paid for all of the overtime hours that they worked and that their managers failed to follow a host of different federal and state wage and hour laws. Notwithstanding the fact that Funeral Directors are, in most cases, *exempt* entirely from federal overtime regulations,[2] they are asking this Court to authorize notice to, and conditionally certify a class of, practically *every* current and former salaried and hourly employee of Carriage Services, Inc. ("Carriage"). See Plaintiffs' Memorandum (Docket No. 2), at pp. 2-3 (referring only to "current and former hourly employees" as members of putative collective action, notwithstanding fact that named Plaintiffs are paid on salary basis). Carriage currently employs approximately 1,500 non-managerial employees in more than 100 different positions in twenty-six different states at more than 170 locations, where day-to-day operations are run with very little corporate oversight. Of those non-managerial employees, more than 50% are actually part-time employees who have no stake in an action seeking extra pay pursuant to a statutory provision that applies only to employees who work more than forty hours per week. Others within the group that Plaintiffs seek to represent (including their fellow Funeral Directors) are properly classified as "exempt" from the overtime provisions of the FLSA, and similarly have no interest in this litigation. In short, Plaintiffs simply cannot establish that they and the putative "class" are "similarly situated" under the FLSA.

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1 Each named Plaintiff states in his or her Declaration that he or she was an "hourly" employee but, in fact, each was a **salaried** employee who was paid on a fluctuating workweek basis. See Declaration of Lorie J. Parmeter, dated January 28, 2008, ¶ 3 ("Parmeter ¶ 3"), a copy of which is attached as Exhibit A. Indeed, it is evident from the face of the Exhibits attached to Plaintiffs' Memorandum in Support of the Motion for Conditional Certification Notice that Plaintiffs knew they were paid a salary pursuant to a fluctuating workweek plan. See Docket No. 2, Exs. B, C, and D.

2 As set forth in more detail in Section IV.A.2, Funeral Directors have been deemed to be exempt under the professional exemption to the FLSA by both the Department of Labor and the only two appellate courts that have addressed the issue. In addition, Funeral Directors satisfy the standards for the administrative exemption under the applicable FLSA regulations. Specifically, these regulations apply where (as here), the employees (1) are paid on a salary basis; (2) have a primary duty of non-manual work directly related to the employer's business; and (3) exercise discretion and independent judgment in the exercise of their duties. See 29 C.F.R. § 541.201-03.

For additional reasons that should be clear from the very limited record compiled to date, this case is poorly suited for collective action treatment. The FLSA issues that Plaintiffs raise focus on: (1) alleged "off-the-clock" work for community service, on-call duties, and pre-need appointments; and (2) the inclusion of certain incentive bonuses in the calculation of the regular rate for overtime purposes – necessarily require highly individualized analyses that cannot be performed on a group-wide basis for differently situated employees in far-flung locations who work under unique circumstances. For each of these claims, Plaintiffs have offered absolutely nothing beyond the same repetitive and wholly unsubstantiated assertions. Such generic declarations certainly do not demonstrate a common, ***national*** practice of "suffering and permitting" any employees, including Funeral Directors, to work off-the-clock at any time or any common, ***national*** practice of improperly calculating the regular rate of pay for overtime purposes. By contrast, even if the Court were to accept as true that the named Plaintiffs' *individual* experiences are described accurately in their declarations, the overwhelming evidence offered by Defendants in their opposition demonstrates that Carriage's practices with respect to community service, on-call work, pre-need appointments, and incentive bonuses vary from location to location, and even person to person.

Carriage runs its business as a highly decentralized operation. Since its inception, its focus has been to grow through acquisitions of largely family-owned businesses. These businesses, though part of a larger corporate umbrella, function autonomously. Plaintiffs' self-serving and unsubstantiated suggestions that Carriage exercised significant "centralized control" simply are not true. That a Funeral Director in Las Vegas allegedly was treated one way has absolutely no bearing on how a Funeral Director (let alone a Funeral Assistant or Maintenance worker) was treated in Iowa or New Jersey or Florida. Plaintiffs simply have not made the necessary showing that all "hourly" employees, as well as the salaried employees swept into the class are "similarly

situated."

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. Plaintiffs' Complaint And Instant Motion

On November 28, 2007, one current and four former Funeral Directors filed a Class Action Complaint alleging that Carriage failed to record properly the time worked by employees and, therefore, failed to compensate its employees in a lawful manner. At the same time, Plaintiffs also filed a Motion for Collective Action Notification, seeking to represent a collective group of "current and former employees of [Carriage] who were suffered or permitted to work time for which they were not compensated, including time for which premium pay was owed but not paid." Complaint ¶ 11; see also Complaint ¶ 19 ("plaintiffs are employees and former employees of [Carriage] who were suffered or permitted to work by [Carriage] and not paid their regular or statutorily required rate of pay for all hours worked"). Plaintiffs offer nothing more specific in their moving papers, referring only to "current and former hourly employees" as members of the putative collective action. Plaintiffs' Memorandum (Docket No. 2), at pp. 2-3.

To date, 88 individuals have submitted "opt-in" notices, indicating their purported desire to become a part of a collective action under the FLSA. These opt-in forms merely indicate a consent to join in the case; they do not indicate any factual basis for the claims. For at least fifteen of those opt-in Plaintiffs, Carriage has no employment records whatsoever (Parmeter ¶ 7), which raises real issues concerning the manner in which these individuals were solicited to join in the case. For those employees as to whom Carriage has confirmed employment, the positions held vary widely, and include Funeral Directors, Training Specialists, Family Service Representatives, Funeral Assistants, Maintenance employees, and even Apprentice Funeral Directors. Parmeter ¶ 7. The duties of these different job classifications differ considerably.

The instant Motion seeks to send out notice to several thousand current and former employees, inviting them to join the case, and to certify a class of employees who would then press a multitude of varying grievances, including claims for: (1) uncompensated, "off-the-clock" time allegedly spent performing undefined community service activities; (2) on-call work,

i.e., work performed by employees on stand-by to deal with unanticipated and urgent matters outside of the normal work day; (3) pre-need appointments, which consist of meetings with families or individuals to discuss a non-urgent or imminent need for funeral services; and (4) the alleged failure to include individual incentive bonuses in the regular rate of pay that is used to calculate the amounts to be paid to employees for overtime worked. Plaintiffs make no effort to define the extent to which they or the approximately 83 other opt-ins actually spent such "off-the-clock" time on community service, on-call time, or pre-need appointments, nor do they delineate the extent of their purported "off-the-clock" work or their individualized bonuses. More importantly, they fail to explain how any failure to pay them for time worked or failure to properly calculate their regular rate of pay flowed from a national practice or policy, as opposed to purely localized decisions by management at any of the three different funeral homes where they worked.

B. Carriage Services, Inc.

1. Carriage's Workforce

Carriage, a leading provider of death care services in the United States, is headquartered in Houston, Texas and does business in twenty-six states, currently employing more than 1,700 individuals nationwide.[3] Parmeter ¶ ¶ 4, 5. Of these 1,700 employees, more than 1,500 are non-managerial employees, and over half of the non-managerial employees work on a part-time basis (fewer than 35 hours per week).[4] Parmeter ¶ 5. Save for approximately 105 corporate employees, Carriage's entire workforce is scattered throughout the nation at individual funeral homes and/or cemeteries. Parmeter ¶ 6. At present, Carriage owns and/or operates 170 funeral homes in the following states: California; Connecticut; Florida; Georgia; Idaho; Illinois; Iowa; Kansas; Kentucky; Maryland; Massachusetts; Michigan; Missouri; Montana; Nevada; New Jersey; .New Mexico; New York; North Carolina; Ohio; Oklahoma; Rhode Island; Tennessee;

[3] Defendants have moved to transfer this case to the United States District Court for the Southern District of Texas, where the company is based, where the relevant documents are located, where the employee benefit plans are located, where the individual defendants reside, and where the greatest concentration of witnesses live and work. As of the filing of this brief, that Motion is still pending.

[4] To date, nineteen of the eighty-five putative opt-ins are part-time employees. (Parmeter ¶ 5.)

Texas; Virginia; Washington; and West Virginia. Parmeter ¶ 4. Carriage also operates thirty-seven cemeteries. Parmeter ¶ 4.

2. Carriage's Funeral Home Operations

The Carriage business model is premised on growth through the acquisition of successful existing family-owned death care service providers. In furtherance of that model, the Company is highly decentralized and relies on local Managing Partners (who are sometimes former owners) for day-to-day oversight of individual funeral homes and cemeteries. Parmeter ¶ 8; Declaration of Jay Dodds, dated January 25, 2008, ¶ 5 ("Dodds ¶ __"), a copy of which is attached as Exhibit B; Declaration of Curt Demrow, dated January 25, 2008 ¶¶ 2, 4 ("Demrow ¶ __"), a copy of which is attached as Exhibit C; Declaration of Darren Diebold, dated January 25, 2008, ¶¶ 5, 12 ("Diebold ¶ __"), a copy of which is attached as Exhibit D; Declaration of Ron Duhaime, dated January 25, 2008, ¶¶ 3-7 ("Duhaime ¶ __"), a copy of which is attached as Exhibit E; Declaration of Loren Forastiere, dated January 25, 2008, ¶¶ 2-7 ("Forastiere ¶ __"), a copy of which is attached as Exhibit F; Declaration of Dan Lang, dated January 15, 2008, ¶ 3 ("Lang ¶ __"), a copy of which is attached as Exhibit G; Declaration of Mitch Rose, dated January 24, 2008, ¶ 13 ("Rose ¶ __"), a copy of which is attached as Exhibit H; Declaration of Jerry Tilton, dated January 24, 2008, ¶¶ 4-5, 7 ("Tilton ¶ __"), a copy of which is attached as Exhibit I; Declaration of David Wolf, dated January 24, 2008, ¶ 14 ("Wolf ¶ __"), a copy of which is attached as Exhibit J; Declaration of Chad Woody, dated January 25, 2008, ¶¶ 3, 6, 10 ("Woody ¶ __"), a copy of which is attached as Exhibit K. Many of the families who have sold their businesses to Carriage remain employed primarily because Carriage respects their individual roles and contributions, and has permitted them to continue to run their businesses with autonomy. See Forastiere ¶¶ 4, 6 (explaining how Carriage is a "resource" to her family's business and how they have recognized Forastiere's "entrepreneurial spirit"); Duhaime ¶¶ 6-7 ("Another reason that I chose Carriage to partner with was because they made clear it was a "hands-off" type of organization, . . . allow[ing] me to maintain a "hands-off" local operation"); Demrow ¶ 4 (same); Woody ¶¶ 6, 10 (same); Declaration of Doug Sidun, dated January 25, 2008, ¶ 5 ("D. Sidun Dec. ¶ __"), a copy of which is attached as Exhibit U; see also Tilton ¶ 3 (explaining his decision to

return to the death care services industry in part because Carriage "respect[s] how important the front-line people are. They understand that it is the people on the ground, in the funeral home who know how the business should be run.")

Of course, Carriage does oversee the localized operations to an extent, but mostly with regard to bottom-line financial performance. It utilizes only three Regional Partners to conduct that oversight, and relies extensively on Managing Partners in each of the local operations to run the day-to-day operations. Dodds ¶ 4. The localized Managing Partners are assessed primarily on their performance, as reflected by profitability metrics, and they determine how frequently to interact with the Regional Partners. Demrow ¶ 16; Diebold ¶¶ 12, 14; Forastiere ¶ 9; Tilton ¶ 5. In some locations, Managing Partners will not reach out to Carriage except for items such as major capital expenditures or in emergencies. See Duhaime ¶¶ 14-15; Wolf ¶ 15; Woody ¶ 10.

Localized Managing Partners, in turn, rely on Funeral Directors (such as the named Plaintiffs) to prepare for and conduct the funerals and otherwise meet the needs of the families that are Carriage's customers. Depending on location, some Funeral Directors refer to themselves as "Funeral Arrangers" or "Funeral Coordinators." See Declaration of Shannon Nordyke, dated January 17, 2008, at ¶ 3 ("Nordyke ¶ __"), a copy of which is attached as Exhibit S. The number of funerals handled at each individual location varies widely, ranging from 900 funerals per year in Las Vegas, Nevada (Lang ¶ 7), to approximately 525 funerals and 450 internments in Panama City, Florida (Rose ¶ 7), to as few as 300 funerals per year in Bristol, Connecticut (Duhaime ¶ 5), to 100 in El Dorado, Kansas (Declaration of Dale Dawson, dated January 25, 2008, ¶ 5 ("Dawson ¶ ___"), a copy of which is attached as Exhibit L). The nature of the business – and, therefore, the nature of the duties of the Funeral Directors – is dictated almost entirely by the needs of particular families and of the community. Demrow ¶ 8; Duhaime ¶ 10; Tilton ¶ 8; Woody ¶ 8. As a result, the demographics of the location in which a Funeral Director is employed will impact how the work is performed. For example, in Las Vegas, "the diversity of the surrounding area makes each funeral different," (Lang ¶ 5), whereas in Iowa, the community is much less diverse and, therefore, there is somewhat more uniform in the services provided (Nordyke ¶ 4). See also Diebold ¶ 6 (explaining how the responsibilities of Funeral Directors are different at his location

because his funeral homes are smaller. In addition, some locations have connections to the county coroners and, therefore, the scope of the duties, hours worked, and even the nature of the work performed there can be significantly different. See Lang ¶ 8; Demrow ¶ 9. At other locations, Carriage is permitted by law to operate cemeteries that it owns, and certain Funeral Directors have dual responsibilities for these different kinds of operations. See Lang ¶ 3; Rose ¶¶ 2, 7; Wolf ¶¶ 1, 5.

Regardless of the location, however, the Funeral Director's independent judgment and discretion ultimately leads to Carriage's operational success. As dictated by the demands and needs of the families/customers, Funeral Directors must be flexible and responsive, and able to go where they are needed on very short notice. Demrow ¶¶ 7, 8; Diebold ¶ 13; Rose ¶ 10; Tilton ¶ 12; Wolf ¶ 12; Declaration of Michael Gadziala, dated January 25, 2008, ¶¶ 6-8 ("Gadziala ¶ __"), a copy of which is attached as Exhibit M; Declaration of Brian Kastner, dated January 25, 2008, ¶ 6 ("Kastner ¶ ___"), a copy of which is attached as Exhibit Q. They must instinctively know how to respond to family preferences and demands, and must be flexible and compassionate in meeting with grieving families, gathering highly personal information in the most difficult circumstances, and then shepherding that family through the process (whether with a viewing, a cremation, or a funeral service). There is no script, nor can there be, given the nature of the business. Demrow ¶ 8; Diebold ¶ 13; Duhaime ¶ 10; Forastiere ¶ 21; Lang ¶ 5; Tilton ¶ 12; Wolf ¶ 12; Dawson ¶ 13; Gadziala ¶¶ 6-8; Declaration of Jason Thompson, dated January 25, 2008, at ¶ 7 ("Thompson ¶ __"), a copy of which is attached as Exhibit W; Declaration of Danielle Wilk, dated January 24 2008, ¶ 6 ("Wilk ¶ __"), a copy of which is attached as Exhibit X; Declaration of Shane Young, dated January __, 2008, ¶ 13 ("Young ¶ __"), a copy of which is attached as Exhibit Y.

Other responsibilities are dictated entirely by location and the philosophies of the localized Managing Partners, or even by the individual Funeral Directors. For example, in Red Bank, New Jersey, the Managing Partner has chosen to employ a strong support staff and outside third-party services who handle more administrative duties, such as drafting obituaries and transferring bodies to the funeral homes. Tilton ¶ 7. In Escalon, California, only one Funeral

Director does any night-transports of bodies, and it is his decision whether to do so or whether to contact a third-party service. Diebold ¶ 9. Some Funeral Directors prefer to embalm more than to interact with families, whereas other Funeral Directors rarely embalm. Compare Declaration of Dave Julius, dated January 18, 2008, at ¶ 6 ("Julius ¶ __"), a copy of which is attached as Exhibit P, with Tilton ¶ __. See also Duhaime ¶ 9; Rose ¶ 12; Wolf ¶ 6. In other locations, the Funeral Directors have responsibility for their professional duties and also for drafting obituaries, filing death certificates, overseeing the execution of contracts with the families, and transferring bodies. Woody ¶ 8; Gadziala ¶¶ 10, 13; Declaration of Dan Shaeffer, dated January 24, 2008, ¶¶ 4-5 ("Schaeffer ¶ ___"), a copy of which is attached as Exhibit T.

Still other differences exist. In Las Vegas, Nevada, at least one Funeral Director is primarily responsible for "ship outs" of deceased to Mexico whose family members and next of kin are out-of-country. See Declaration of George Herrera, dated January 18, 2008, ¶ 6 ("Herrera ¶ __"), a copy of which is attached as Exhibit N. In other locations, there are full-time pre-need employees and, therefore, the Funeral Directors do not have any responsibility for pre-needs and in other locations, Funeral Directors are not licensed to sell pre-need policies and, therefore, do not do so at all. Dawson ¶ 9; Shaeffer ¶ 8; D. Sidun ¶ 15; Declaration of Ted Sidun, dated January 25, 2008, ¶ 12 ("T. Sidun ¶ ___"), a copy of which is attached as Exhibit V; Thompson ¶ 15. In contrast, only one Funeral Director in Las Vegas sells the "pre-need" policies at issue in this litigation – that person is one of the named Plaintiffs, Spencer Cranney. In short, the job duties, the day-to-day activities, and the hours worked of Funeral Directors are highly individualized, and vary based on geographic location, managing partner, as well as the preferences of each family that Carriage services.

3. The Relevant "Policies" And Practices of Carriage

Throughout the Complaint and Motion for Collective Action Notification, as well as in the Declarations submitted by Plaintiffs, there are numerous references to Carriage's "Community Work Policy," "On Call Pay Policy," "Pre-Needs Appointment Policy," and "Calculation of Additional Remuneration Policy." See Complaint (Docket No. 1) ¶ 48; Plaintiffs' Memorandum (Docket No. 2) at pp. 3-8, 18-22. In fact, however, no such polices exist. Parmeter ¶ 9. To the

contrary, Carriage's handbook includes a "Timekeeping Procedures" provision, which specifically instructs that "[a]ll employees are required to maintain a time record," and that:

> All time worked must be recorded. ***"Working off the clock" is strictly prohibited and may not be authorized by the Managing Partner or any other supervisor.*** If this occurs, please notify your Regional Partner or the Human Resources Department. You may do this confidentially by using My Safe Workplace.

Parmeter ¶ 10, Exhibit 1 (emphasis added). Carriage's handbook also includes an "Overtime Pay Practices" provision in which the Company confirms that "All ***hourly non-exempt employees*** are entitled to overtime pay for all hours worked in excess of forty (40) hours in each workweek," subject to differences in applicable state law. Parmeter ¶ 11, Exhibit 2.

Hours Worked by Funeral Directors

As set forth above, the specific responsibilities of Funeral Directors vary from location-to-location, by manager-to-manager, and even from day-to-day, depending on the needs of the business and the families. Although Funeral Directors generally work at the funeral home or cemetery during the day, during those hours, if a Funeral Director is not attending to the needs of a family, he or she is free to run personal errands, read the newspaper, attend Rotary and Kiwanis meetings, meet with local clergy, or even "day trade" stocks, without "punching out." Demrow ¶¶ 7, 11; Diebold ¶ 11; Tilton ¶ 18; Herrera ¶ 11; D. Sidun ¶ 12; Young ¶ 17. In other words, Funeral Directors often have the flexibility to conduct significant non-company business on company time.

Because of the fluctuating nature of the business, a Funeral Director may have to work outside of regularly scheduled hours as the need arises. In recognition of this commitment, Funeral Directors generally are paid on a fixed salary, but also receive overtime compensation, as well. Parmeter ¶ 3 (as to all named Plaintiffs); Dawson ¶ 4; Gadiziala ¶ 2; Nordike ¶ 6; Shaeffer ¶ 3; D. Sidun ¶ 6; Thompson ¶ 5; Wild ¶ 7. At certain locations, some Managing Partners exercise their considerable discretion to pay additional incentive compensation to Funeral Directors. Compare Lang ¶ 15; Tilton ¶ 19; Wolf ¶ 13; Shaeffre ¶ 10 with Demrow ¶ 17; Forestiere ¶ 17; Rose ¶15; Dawson ¶ 14; Thompson ¶ 12; Young ¶ 16. In addition, certain Managing Partners will pay for tickets, fees or dues to various organizations and events. Demrow

¶ 12; Diebold ¶ 11; Forestiere ¶ 18; Rose ¶ 14; Woody ¶ 13; Dawson ¶ 10; Herrera ¶ 9; Declaration of Richard Magdycz, dated January 25, 2008, ¶ 4 ("Magdycz ¶ __"), a copy of which is attached as Exhibit R; D. Sidun ¶ 12; Wild ¶ 14.

As a general matter, all employees (including Funeral Directors) "clock in" at fingerprint time clocks located somewhere within their individual funeral homes. Dawson ¶ 7; Declaration of Mark Hopkins, dated January 18, 2008, ¶ 7, ("Hopkins ¶ ___"), a copy of which is attached as Exhibit O; Julius ¶ 8; Shaeffer ¶ 4; Thompson ¶ 10; Wolf ¶ 8; Young ¶ 9. In some locations, Funeral Directors begin their day at a "hub" location, and "clock-in" at that location instead. See Tilton ¶ 9. When employees are unable to "clock in" – either because they are driving directly to an appointment or a service from their home, because of a problem with the clock, or simply because they forget – the Managing Partners must find their own ways to deal with the missed time recordings to ensure that employees are paid properly. Dodds ¶¶ 11-14. For example, many Managing Partners have created written "Missed Punch Logs," or some other written form by which employees (including Funeral Directors) can record their time worked and submit that time to the Managing Partner or to another office employee. Demrow ¶ 14; Diebold ¶ 10; Rose ¶ 8; Tilton ¶¶ 9-10; Wolf ¶ 9; Forestiere ¶ 14; Declaration of Joe Donnelly, dated January 17, 2008, ¶ 4 ("Donnelly ¶ __"), a copy of which is attached as Exhibit Z. Other Managing Partners discuss time issues with employees and, if necessary, adjust the time directly in Carriage's computer system. See, e.g., Duhene ¶ 12; Lang ¶ 16; Woody ¶ 12, Dawson ¶ 7; Thompson ¶ 10; Wilk ¶ 11. Therefore, if a Funeral Director works after-hours either due to a late-night pre-need appointment, removal of a body, or other work-related reason, each Carriage location has its own practices in place to ensure that all time worked is recorded. As explained by one Managing Partner, it is his and Carriage's policy that "no one works for free." Tilton ¶ 9; see also Forestiere ¶ 15; Lang ¶ 16; Woody ¶ 11 ("the policy here at Watson-King is that if you are working, you are on the clock"); D. Sidun ¶ 7; Magaycz ¶ 8; Dawson ¶ 8 (explaining that he has never been told not to account for all time worked nor has he ever had a problem with being created for all time worked); Gadziala ¶ 15 (same); Herrera ¶ 10 (same); Hopkins ¶¶ 9-10 (same); Julius ¶¶ 13-14 (same); Kastner ¶ 10 (same); Nordyke ¶¶ 8-9 (same); Shaeffer ¶ 6 (same); T. Sidun ¶8 (same).

On-Call Time

Due to the nature of the business, the Managing Partners, the staff, and the Funeral Directors employed by Carriage may be scheduled for occasional "on call" time. Dodds ¶ 10 Demrow ¶ 7 ("The nature of the beast is that a Funeral Director must be available all hours of every day, including holidays.") Forestiere ¶ 12; Wolf ¶ 12 (explaining that, as a licensed Funeral Director now employed as a Managing Partner, "Yes, we are open 365 days a year and it is a 24-hour business, but the upside is that there is so much freedom."); Gadziala ¶ 6 ("I enjoy my profession because I like the community, the freedom, and I like being busy. Sometimes the nature of the business requires long hours, but I don't mind because I enjoy serving families."); Nordike ¶ 6; D. Sidun ¶ 9. For those Funeral Directors who agree to be scheduled for on call time, the Managing Partner decides how to allocate "on call" responsibility. For example, in Springfield, Massachusetts, full-time and part-time Funeral Directors are required to be "on call" one night per workweek and one night every three weekends. See Forestiere ¶ 12; Gadziala ¶ 14. In Escalon, California, the "on call" schedule essentially is up to the Funeral Directors. Diebold ¶¶ 6-7. Regardless of the schedule, being "on call" does not require any employee, including a Funeral Director, to sit at the funeral home throughout the call period. Gadziala ¶ 14. Rather, "on call" employees simply must be available to remove the deceased, as necessary, should immediate action be necessary. Dodds ¶ 10. See also Gadziala ¶ 14; Kastner ¶8; Shaeffer ¶ 5. Typically, the time required to remove a body is less than two hours. Dawson ¶ 5; D. Sidun ¶ 9. All employees, including Funeral Directors have been instructed to either "clock in" and "clock out" or otherwise record all time spent (if any) while on call. Dawson ¶ 6; Gadziala ¶ 14; Katner ¶ 9; Magdycz ¶ 6; D. Sidun ¶ 9; Thompson ¶ 9; Young ¶ 9.

Pre-Need Appointments

Some, but not all, Carriage funeral homes employ a "Pre-Need Counselor." In this role, an employee markets to and meets with individuals in the community to create a death services plan with Carriage before the need for such services arises. Dodds ¶ 17. In some locations, these employees manage their own schedules, and are paid exclusively on commission. Dodds ¶ 17. Very few Funeral Directors are required to conduct pre-need appointments outside of the regular

business day. Dodds ¶ 17. However, to the extent that a Funeral Director (or any other employee) conducts such an appointment, whether during regular working hours or otherwise, Carriage and its Managing Partners expect that all such time will be compensated. Dodds ¶ 17; Parmeter ¶ 13.

Community Service

The concept of uncompensated "community work" or "community service" is not a "policy" of Carriage. Parmeter ¶ 9; Dodds ¶ 8; Demrow ¶ 11; Forestiere ¶ 18; Tilton ¶ 16; Wolf ¶ 11; Woody ¶ 13; Dawson ¶ 10; Gadziala ¶ 11; Herrera ¶ 9; Hopkins ¶ 11; Julius ¶ 15; Kaster ¶ 7; Magdycz ¶ 4; D. Sidun ¶ 12; T. Sidun ¶ 11; Thompson ¶ 13; Wilk ¶ 14; Young ¶ 17. First, the types of community service in which Funeral Directors are involved are hardly services for which an employer should be responsible. Most notably, many Funeral Directors view their church activities to be "community service" that relates to their work. See Nordyke ¶ 10 (explaining how her personal decision to join and attend a local church has resulted in business for Carriage, describing the referrals as "a nice added benefit to going to church – something I believe I should be doing anyway!"); Shaeffer ¶ 11 (explaining how his and his wife's involvement in their church relates to his work as a Funeral Director but acknowledging that Carriage "is not why I am involved in church"). Other Funeral Directors participate in additional activities that have personal meaning to them, including the Kiwanis and the VFW, and which they would be doing even if they were not employed by Carriage. Dawson ¶ 10; Hopkins ¶ 11; Kastner ¶ 7; Magdycz ¶ 4; Shaeffer ¶ 11; D. Sidun ¶ 12; T. Sidun ¶ 11; Wilk ¶ 14.

Further, community service is just a part of the death care services industry. It is a business built on relationships and on trust, and one way to build those critical relationships happens to be through the same community services that the Funeral Directors and Managing Partners would participate in regardless of their profession. Dodds ¶ 8; Demrow ¶ 11; see also Wolf ¶ 11 (explaining that his Funeral Directors use community service as a way to "find their passion" so that they are happy and fulfilled employees). Indeed, at some Carriage locations, community service is not even discussed because certain individuals (usually former owners) already have established a presence in the community. See, e.g., Rose ¶ 14; Duhaime ¶ 13; see

also Julius ¶ 15 (explaining how he chooses not to be involved in any community service); Thompson ¶ 13 (explaining how he is not interested in "traditional" Community Service and opts for events for which he is compensated). At most, community service is encouraged by Managing Partners (and recognized by Funeral Directors) as "soft-skill" that Funeral Directors should consider in terms of their professional development. See Demrow ¶ 11 (a "no brainer" in the profession); Lang ¶ 18 ("good idea for any professional"). In the few locations at which Managing Partners have hosted community service events, employee attendance either is not mandatory (Forastiere ¶ 18) (sponsoring "one large-scale community outreach sent per year), or the employees are paid for their work at those events (Woody ¶ 15) (calling bingo once per month at a senior center); Diebold ¶ 11 (attending "morning coffee" sponsored by the Chamber of Commerce.

Individual Incentive Bonuses

Plaintiffs suggest that bonuses were not included in the determination of the regular rate and, therefore, that overtime calculations were improper under the FLSA. However, other than the discretionary performance-based quarterly "EIS" bonuses for which Funeral Director may be eligible, all other bonuses vary by region and by Managing Partner. Parmeter ¶ 12; Dodds ¶9. Some Managing Partners choose to incent Funeral Directors and other staff members through individual discretionary bonuses, such as "flower bonuses," "monument bonuses," or even embalming incentives. Donley ¶ 5; Demrow ¶ 17; Duhaime ¶ 16; Tilton ¶ 19; Wolf ¶ 13. In some locations, Funeral Directors are able to arrange for their own bonuses with local service providers. Shaeffer ¶ 10. In other locations, the Managing Partners exercise their significant discretion ***not*** to offer any individual incentive bonuses. Diebold ¶ 14; Forestiere ¶ 17; Rose ¶ 15; Woody ¶ 9; Dawson ¶ 14; Thompson ¶ 12; Young ¶ 16.

III. THE LEGAL STANDARD

Before a district court can conditionally certify an FLSA collective action and authorize notice to be sent to the members of such a group, the plaintiffs must demonstrate that they are "similarly situated" to the potential collective action members. 29 U.S.C. § 216(b) (stating that "an action [for relief under the FLSA] may be maintained . . . by any one or more employees for

and on behalf of . . . other employees similarly situated"); Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004) ("To certify a FLSA collective action, the court must evaluate whether the proposed lead plaintiffs and the proposed collective action group are 'similarly situated' for purposes of § 216(b). Plaintiffs bear the burden of making this showing."). To meet this burden, plaintiffs cannot rely on "unsupported assertions of widespread violations." Edwards v. City of Long Beach, 467 F. Supp.2d 986, 990 (C.D. Cal. 2006). Stated another way, "before subjecting an employer to the burdens of a collective action, the plaintiffs must establish a colorable basis for their claim that a [ ] class of 'similarly situated' plaintiffs exist." West v. Border Foods, Inc., 2006 WL 1892527, at *9 (D. Minn. June 12, 2006). Here, Plaintiffs have failed to satisfy their burden.

IV. ARGUMENT

A. The Overly Broad And Undefined Scope Of The Proposed Class Makes Clear, On Its Face, That Group-Wide Adjudication Of Plaintiffs' FLSA Claims Would Be Improper.

1. The Scope Of The Class Is Overly Broad.

The deficiencies of the Motion are abundantly clear from the face of the Complaint and Motion itself. Plaintiffs seek to represent a collective group of "current and former employees of [Carriage] who were suffered or permitted to work time for which they were not compensated, including time for which premium pay was owed but not paid." The lead Plaintiffs – all self-described salaried Funeral Directors and/or Funeral Directors/Embalmers – make absolutely no relevant distinction among themselves and the "hourly" employees they seek to certify as a collective action, and whom they wish to solicit to join this case by way of a Court-approved notice. Even Plaintiffs acknowledge that they must demonstrate "a factual nexus between the

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employees and the alleged polic[ies]" at issue. See Plaintiffs' Memorandum, at p. 16.[5] Here, Plaintiffs have not done so, choosing to focus entirely on vague and undocumented "policies" allegedly applicable to, at most, Funeral Directors.

Based solely on the putative opt-ins to date, it appears that Plaintiffs, as Funeral Directors/Embalmers, ask to represent a class of employees that includes an extraordinarily broad group, ranging from Training Specialists to Maintenance employees to Family Service Representatives to Funeral Assistants and Apprentice Funeral Directors. Beyond the putative opt-ins, Plaintiffs' proposed collective action certification would include every other non-managerial position at Carriage, including clerical and other support staff. Moreover, it is irrefutable that more than 50% of Carriage's workforce is employed on a part-time basis and, therefore, the issues raised by Plaintiffs' Motion have little, if any, bearing on them (since such employees, by definition, never work more than 35 hours per week). See Section II(B)(1) for record citations.

Contrary to Plaintiff's premature assertions, Carriage's opposition to the certification Motion is not premised just on the fact that putative collective action members work in different locations or because they performed a "variety" of jobs. See Plaintiffs' Memorandum, at p. 16.[6] The problem is much more basic; if Plaintiffs' Motion were successful, this Court would assume responsibility for the management of a case necessitating notice to more than 1,500 current

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[5] Plaintiffs contend that "the fact that notified employees may or may not ultimately be found to be similarly situated make any difference at the notification stage." That argument is undermined by the very cases they cite. See, e.g., Williams v. Trendwest Resorts, Inc., No. CVS05-0605, 2006 WL 3690686, at **4-5 (D. Nev. 2006) (explaining that, at the notice stage, "The plaintiffs bear the burden of showing they are similarly situated" and referring again to the need to demonstrate that the putative plaintiffs are "similarly situated"). Moreover, even to the extent courts recognize that, ultimately, a class may not be certified after the notice stage, they still require some "factual nexus" between the allegations and the putative class members. Plaintiffs, however, have failed to provide any such nexus between "all hourly employees" of Carriage and the policies and practices the five lead Plaintiffs/Funeral Directors, who are all paid on a salary basis, have identified.

[6] Indeed, once again, the cases cited by Plaintiffs do not stand for the proposition for which Plaintiffs offer them. Contrary to Plaintiffs' assertions regarding the court's conclusions in Mershon v. Elastic Stop Nat. Div. of Harvard Indus., No. 87-1319, 1990 WL 484152 (D.N.J. Mar. 23, 1990), that court ***did*** require that the putative ADEA collective action members be employed "in the same corporate department, division, and location," to advance similar claims of discrimination. Mershon, at *6. The court's decision in Heagney v. European American Bank, 122 F.R.D. 125 (E.D.N.Y. 1988) is similarly misplaced, for in that case, the "policy" at issue was a corporate-wide voluntary early retirement program that allegedly unlawfully targeted and impacted older workers. Because all putative class members received the same incentives and benefits under the program, the fact of different locations was (unlike here) irrelevant to the similarly situated analysis for the issues before the court. Heagney, 122 F.R.D. at 127.

employees, and at least 3,000 former employees without *any* evidence that any of these employees are similarly situated in *any* relevant respect to the lead Plaintiffs, or that the majority of these individuals could have any stake in this litigation. That result is directly contrary to all applicable precedent, and to the "efficient case management" purpose of the FLSA's notice and conditional certification procedures.

In short, the scope and breadth of the proposed group to which notice would be sent *as defined and described by Plaintiffs* demonstrate the fundamental deficiency of the Motion. Given the range of positions captured by Plaintiffs' proposed undefined group of "current and former employees," it is impossible that Plaintiffs ever could satisfy the necessary "similarly situated" standard even for conditional certification, and this Court should deny Plaintiffs' Motion for this reason alone.

2. The Fundamental Flaw Of Plaintiffs' Motion Is Highlighted By The Fact That All Lead Plaintiffs Are Or Were Employed As Funeral Directors – A Position That Is Largely Exempt From The FLSA's Overtime Provisions.

The failure of Plaintiffs' Motion is particularly evident when one considers that all lead Plaintiffs held only one position: Funeral Director. The Department of Labor and courts have noted that, in most circumstances, that position is exempt from the FLSA's overtime requirements. As such, the FLSA issues raised in Plaintiff's Complaint and Motion are entirely irrelevant to any of the lead Plaintiffs.

Specifically, the applicable regulations regarding "Learned Professionals" makes clear that:

> [l]icensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

29 C.F.R. § 541.301. Carriage recognizes that it will have further opportunity to vet the merits of the lead Plaintiffs' individual claims. That future opportunity notwithstanding, it is essential to understand – prior to ruling on notice and conditional certification – that the lead Plaintiffs and most of the putative collective opt-ins to date, are most likely exempt from the very laws they are

trying to enforce.

Perhaps anticipating this defense, the lead Plaintiffs tellingly failed to provide any information regarding their educational background in their Declarations. However, the overwhelming majority of the Funeral Directors who submitted Declarations in support of Carriage's Motion did. In the Las Vegas location alone, Dave Julius is a licensed Funeral Director who obtained a degree in Mortuary Science from Worsham College of Mortuary Science in Wheeling, Illinois (Julius ¶ 2); George Herrera is a licensed Funeral Director who completed a professional program in Mortuary Science at Cypress College (Herrera ¶ 3); and Shannon Nordyke is a licensed Funeral Director who attended college and received a degree in Mortuary Science from Carl Sandberg College (Nordyke ¶ 2.) Virtually every other Funeral Director who has submitted a Declaration in this case similarly is licensed and has completed a professional course of study in the mortuary sciences. See Dawson ¶ 2; Shaeffer ¶ 2; T. Sidun ¶ 9; Thompson ¶ 2; Wilk ¶ 3; Young ¶ 4; see also Demrow ¶ 3; Diebold ¶ 3; Duhaime ¶ 2; Lang ¶ 2; Tilton ¶ 6; Wolf ¶ 3; Woody ¶ 4 (all Managing Partners who also are licensed Funeral Directors who completed professional courses of study in the mortuary sciences). The qualifications of these Las Vegas Funeral Directors alone highlight that there are real and significant issues regarding the overbreadth of Plaintiffs' proposed class and, therefore, why Plaintiffs' proposal for notice and conditional certification is reckless and overreaching.

Further, without regard to whether certain Funeral Directors satisfy the "Learned Professional" exemption, the only two courts to have considered in publicly available opinions whether licensed Funeral Directors are exempt have concluded that they are, in fact, exempt from the FLSA's overtime requirements. In 1998, the Seventh Circuit affirmed a district court's conclusion that a licensed funeral director and embalmer was a professional, citing with approval the district court's findings that the funeral director at issue "achieved the highest state license level, was the only licensed funeral director and embalmer at the funeral home, was authorized to and did conduct all aspects of the funeral business and was frequently solely in charge of the funeral home due to his employer's absence." See Szarnych v. Theis-Gorski Funeral Home, Inc., No. 97-3069, 1998 WL 382891, at *1 (7th Cir. June 4, 1998). Two years after the Seventh

Circuit's decision, the Court of Appeals for the Sixth Circuit similarly affirmed a district court's conclusion that an employee who worked as funeral director and embalmer was exempt from the FLSA's overtime provisions. In Rutlin v. Prime Succession, Inc., 220 F.3d 737 (6th Cir. 2000), the appellate court accepted the district court's findings that because the employee completed a specialized course of instruction – even though he did not obtain a bachelor's degree – he had the requisite "advanced, specialized knowledge" necessary for the exemption. Rutlin, 220 F.3d at 743. In addition, the court noted that the employee exercised the requisite independent judgment and discretion, citing duties such as "counseling grieving families, and removing, embalming and cosmetizing bodies . . . often unsupervised in those duties." Id.

Once again, the decisions in Rutlin and Szarnych are not dispositive, but they are telling, particularly at this stage of the proceedings. Even if Funeral Directors do not satisfy the strictest terms of the "Learned Professional" exemption, there is, at the very least, a strong argument that Carriage's Funeral Directors can satisfy the administrative exemption from the FLSA. See 29 C.F.R. § 541.201-03 (explaining that employees must be paid on a salary basis, have primary non-manual duties related to the employer's business, and exercise independent judgment and discretion). It is indisputable that Funeral Directors are paid on a salary basis and that their duties – arranging funeral services and, for some, embalming – directly relate to Carriage's business. Further, all of the factors cited by the Seventh and Sixth Circuit Courts of Appeal as exercises of discretion, judgment, and professional duties – counseling grieving families, removing, embalming and cosmetizing bodies, and generally being in charge of the funeral home in the owner's absence – are all duties for which the Funeral Directors employed by Carriage are responsible. Lang ¶ 5; Rose ¶ 11; Tilton ¶ 13; Gadziala ¶¶ 8, 10, 13; Hopkins ¶ 4; Thompson ¶ 7; Young ¶¶ 12-13. As explained by a number of Managing Partners in their Declarations, it is an impossibility for Funeral Directors to do their jobs without the ultimate independence and discretion. Demrow ¶ 8; Forastiere ¶ 21; Wolf ¶ 7.

In short, it is evident from the Declarations provided by Carriage in support of its opposition that there exist myriad individual issues to be resolved regarding the exempt status of Carriage's Funeral Directors – the very position Plaintiffs are trying to use to bootstrap an

unwieldy collective action. As such, this Court should recognize the instant Motion for what it really is: an effort by a miniscule group of disgruntled Funeral Directors, who are likely exempt from the FLSA, to use a nationwide platform to vet their personal grievances against their current and former employer.

B. Given Carriage's Decentralized Business Model And Philosophy, The Issues Raised Are Too Individualized For Group-Wide Adjudication.

Even if everything that Plaintiffs say in their declarations is accepted as true, those assertions could establish FLSA violations only as to *those* employees in *those* locations.[7] Their "facts" tell, at best, only part of the story, and they make gross generalizations from incomplete information. They now ask the Court to make a highly tenuous leap of faith that because there allegedly were issues with a policy at *their* location with regard to decisions made by *their* specific Managing Partners, then there must be issues at the more than 170 other locations with the approximately 75 other Managing Partners as well. Such speculation and conjecture do not suffice to meet Plaintiffs' burden for conditional certification, particularly when viewed against the irrefutable and contrary evidence grounded in personal knowledge proffered by Carriage.

To gain conditional certification of a collective action under the FLSA, Plaintiffs must demonstrate that "the putative class members were together the victims of a **single decision, policy, or plan**." Gerlach v. Wells Fargo & Co., No. C05-0585, 2006 WL 824652, at *2 (N.D. Cal. Mar. 28, 2006) (emphasis added); accord Thiessen v. GE, 267 F.3d 1095, 1102 (10th Cir. 2001); Scholtisek v. Eldre Corp., 229 F.R.D. 381, 387 (W.D.N.Y. 2005) (noting that courts require plaintiffs at the notice stage to make "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan"). As it is their burden to convince the Court that the employees whom Plaintiffs seek to provide notice are similarly situated, Plaintiffs must do so for all of the different locations at which employees work. See, e.g., Horne v. United Serv. Auto. Ass'n, 279 F. Supp.2d 1231, 1235 (M.D. Ala. 2003) (finding

[7] To the extent Plaintiffs make conclusory assertions regarding matters of which they have no personal knowledge, those allegations should not be considered. See, e.g., Declaration of Douglas Brown, at ¶ 12 ("Carriage too had a company-wide policy requiring hourly employees, such as myself to actively participate in at least one outside community organization and as a means to increase the Company's business.").

that "a plaintiff must demonstrate that employees outside of the work location for which the plaintiff has provided evidence were similarly affected by alleged work policies in order for the court to certify a collective action which extends beyond the plaintiff's own work location"). Here, Plaintiffs' efforts to create company-wide time-recording policies when none actually exist and to create company-wide guaranteed bonuses when the only bonuses actually are, at best, offered on a discretionary, location-by-location or person-by-person basis cannot satisfy those burdens. Rather, it is clear that the decentralization and independent operations of Carriage's locations do not permit any finding of a "single decision, policy, or plan" that implicates any of the issues raised by Plaintiffs' Motion.

1. "Off-the-clock" allegations such as those at issue are not appropriate for group-wide adjudication.

Courts repeatedly have recognized that "where an 'off-the-clock' claim requires significant individual considerations, it may be inappropriate for conditional certification." Ray v. Motel 6 Operating Ltd. Partnership, 1996 WL 938231, *4 (D. Minn. Mar. 18, 1996) (denying motion for notice to class because plaintiffs worked at a minimum of 39 different properties, located in 20 different states; the properties where the plaintiffs worked varied widely as to the number of rooms and budgets; and the amount of overtime hours varied among plaintiffs, as such the off-the-clock issues were too individualized for collective action adjudication); see also Diaz v. Electronics Boutique, 2005 U.S. Dist. LEXIS 30382 (W.D.N.Y. 2005) (concluding that allegations regarding off-the-clock work and altered time records "are too individualized to warrant collective action treatment"); Lawrence v. City of Philadelphia, 03-CV-4009, 2004 WL 945139, at *2 (E.D. Pa. Apr. 29, 2004) (denying motion for class certification in "off-the-clock" case because "[t]he circumstances of [the] individual claims potentially var[ied] too widely to conclude that. . . the Plaintiffs [were] similarly situated" to those they sought to represent); Sheffield v. Orius Corp., 211 F.R.D. 411, 413 (D. Or. 2002) (declining to certify off-the-clock class action where affidavits submitted "suggest that each claim would require extensive consideration of individualized issues of liability and damages").

In the above-cited West v. Border Foods, Inc., 2006 WL 1892527, the Court found that, as

here, individual issues predominated and conditional certification was improper in an "off-the-clock" case when the plaintiffs "were employed at different [ ] locations, where different individual [ ] managers allegedly used varying means to deprive the Plaintiffs of proper compensation for his or her (sic) overtime hours." Id. at *9. See also England v. New Century Fin. Corp., 370 F. Supp.2d 504, 509 (M.D. La. 2005) (finding conditional certification improper in an "off-the-clock" claim involving a multitude of different managers at different locations, and where liability at one location would not necessarily require a finding of liability at another location); Cornn v. United Parcel Serv., Inc., No. C03-2001 TEH, 2005 WL 2072091, at *2-6 (N.D. Cal. Aug. 25,

2005) (denying class certification where plaintiffs alleged off-the-clock work, but failed to present evidence that there was a common policy as to what employees did during that time, how long it took, and whether they did so consistently); Basco v. Wal-Mart Stores, Inc., No. 00-3184, 2004 WL 1497709, at *7 (E.D. La. July 2, 2004) (finding that where defendant had official policy requiring payment for all working time, and where defendant asserted that deviations from that policy occurred "on a manager-by-manger and associate-by-associate basis involving particular circumstances and anecdotal testimony," plaintiffs had failed "to demonstrate identifiable facts or legal nexus that [bound] the claims so that hearing the cases together [would promote] judicial efficiency").

Although Plaintiffs Declarations and Memorandum suggest a number of purported "centralized" policies that preclude employees from being compensated for all time worked, there is absolutely no evidence of any such policies.[8] As set forth above, no Managing Partner or Funeral Director who submitted declarations under oath in opposition to Plaintiffs' Motion was aware of any off-the-clock policy, particularly with respect to "community service," "on-call

[8] The fact that Carriage includes "Community Service" as one of the subjective evaluation components in its performance evaluations is irrelevant to this analysis. To suggest that a subjective evaluative factor constitutes a "policy" and, therefore, that time spent on that factor becomes compensable time would turn the distinction between work and personal time on its head. By way of just one example, "Attitude" is a similarly subjective factor that is included in performance evaluations, and, if it should be considered a company "policy" for which time is compensable, there would be no reason not to require employers to compensate employees for all time spent getting into a proper frame of mind for work. Such a result is patently absurd.

time," or "pre-need appointments." See Section II.B.3 for record citations. To the contrary, each Funeral Director – including those in the locations at which the lead Plaintiffs are or were employed – confirmed that they have been instructed at all times to ensure that all time worked – for whatever reason – is recorded. See Hopkins ¶¶ 7-10 (Las Vegas Funeral Director, denying knowledge of any policy by which he would not be compensated for time worked, explaining ways he is encouraged to ensure that all time worked is accurately recorded, and confirming that he has never had a problem receiving compensation for all time worked); Julius ¶¶ 8-14 (Las Vegas Funeral Director, same); Herrera ¶ 10 (Las Vegas Funeral Director, confirming that he "never ha[s] been asked to perform any work for which I have not been fully compensated" and explaining that "[i]t is not the culture [in Las Vegas] to ask employees to 'work off the clock'"); Nordyke ¶¶ 7-9 (Las Vegas Funeral Director, confirming all the same); Gadziala ¶ 15 (Springfield Funeral Director, confirming the same); Magdycz ¶¶ 7-8 (Springfield Funeral Director, confirming same; Kastner ¶¶ 9-10 (same). Similarly, each Managing Partner has instituted mechanisms by which to ensure that all time worked is recorded and compensated. See Section II(B)(3) for record citations.

At most, all that is before the Court are the alleged experiences of five individual Funeral Directors. In contrast, Carriage has demonstrated how Funeral Directors in those same locations as well as Funeral Directors employed in nearly 170 other locations had vastly different experiences with respect to community service, on-call work, pre-need appointments, and compensation for time worked. See Section II.B.3 for record citations. In short, Plaintiff's paltry and unsubstantiated allegations of "company-wide" issues should be insufficient as a matter of law to warrant notice as to their respective states alone, and certainly should be insufficient to warrant notice nationwide.

2. As with the "off-the-clock" allegations, the individualized and discretionary nature of the incentive bonuses preclude notice and conditional certification regarding Plaintiffs' allegations that Carriage improperly calculated the regular rate of pay.

For all of the reasons set forth above with respect to "off-the-clock" allegations, the claims relating to individual discretionary incentive bonuses – including the "flower bonuses" only

certain of the lead Plaintiffs ever received – should not be subject to notice and conditional certification. These incentives, for those locations that had incentive compensation at all, were established exclusively on a Managing Partner-by-Managing Partner basis. As a result, neither nationwide notice nor conditional certification would be appropriate. Once again, the "similarly situated" standard applies – and none exists here. Carriage, as a company, sponsors only one discretionary bonus program for its Funeral Directors only. To the extent discretionary bonuses exist, they are determined on a local-level by individual Managing Partners, and, in some instances, are determined between the Funeral Directors and outside third-party vendors. See Section II.B.3 for record citations.

Further, to the extent individual Managing Partners decided to establish individual incentive bonuses, Plaintiffs have failed to offer sufficient information to the Court demonstrating why their individual issues should be adjudicated on a class-wide basis. In addition, in order to determine whether a discretionary bonus should have been included in calculating the regular rate of pay for overtime purposes, the Court must determine, at the least: (1) whether the individual who received the bonus is exempt (i.e., Funeral Directors); (2) whether the bonus was discretionary, such that it need not be included in any calculation for overtime purposes (29 U.S.C. § 207(e)(3); 29 C.F.R. § 778.211); and (3) whether, for each workweek, overtime hours needed to be calculated for each individual employee. Each of those inquiries, on its face, necessarily is an individualized, fact-specific inquiry.

Moreover, the fundamental flaw of this case – that the class is so overly broad – further highlights why this issue specifically is not appropriate for group-wide adjudication, even for those few Funeral Directors that might be determined to be non-exempt. First, of the approximately 1,700 current employees, 904 – more than 50% of the ***entire*** Carriage population (including managers who could not be part of this putative collective action) – are employed on a part-time basis. Thus, the regular rate for overtime simply does not apply more than 50% of the putative class to which Plaintiffs are asking to send notice. Moreover, as set forth above in Section IV.(B)(3), to the extent positions such as Funeral Directors, or other positions, for that matter, are considered exempt from overtime, the regular rate also is of no consequence to those

additional putative collective action members. Accordingly, whether an individual incentive bonus even should, as a matter of law, be required to be included in the calculation of the regular rate of pay, necessarily will require a location-by-location analysis that is antithetical to the "similarly situated" standard required for notice and conditional certification.

V. CONCLUSION

Plaintiffs' Motion does more than put the quintessential cart before the quintessential horse. Rather, Plaintiffs' Motion dispenses entirely with the quintessential horse. It ignores entirely the fundamental requirement that the plaintiff carry the burden of demonstrating that the putative class under the FLSA be "similarly situated" (or, in Plaintiffs' words, bear some "factual nexus") in any meaningful or relevant way. Plaintiffs do not even come close to satisfying the evidentiary burden necessary to have their Motion granted. But if there were any doubt, the evidence submitted by Carriage in opposition to Plaintiff's Motion conclusively shows that Plaintiffs are not similarly situated to other employees in the proposed nationwide class. That a Funeral Director in Las Vegas, Nevada, alleges that he has been directed to work without recording time or that the bonus his manager once provided was not included in his regular rate of pay means absolutely nothing with regard to how employees in Danville, Kentucky, or Bristol, Connecticut, or Rockingham, North Carolina, have been treated. Those allegations mean even less to a Training Specialist or Maintenance employee. Therefore, for all of the reasons set forth

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above, Carriage Services, Inc. respectfully submits that Plaintiffs' Motion for Collective Action Notification should be denied in its entirety.

Dated: January 28, 2008

/s/

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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89109. On January 28, 2008, I served the within documents:

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR COLLECTIVE ACTION NOTIFICATION

By placing a true copy of the documents listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States Mail at Las Vegas, Nevada as set forth below and by CMF/ECF>

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice, it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of January 2008 at Las Vegas, Nevada.

Renee M. Williams

Renee M. Williams